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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, PETITIONER

vs.

GENEVIEVE E. FRANKEL, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF SAMUEL F. FRANKEL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT

The statement in government's brief omits some pertinent facts. In addition to those stated, it appears from the record and the findings of fact that deceased had been fully compensated for all services he performed for Badger Foundry Company during his lifetime, there was no precedent for making these payments to his widow, she was not a stockholder, an officer or an employe and had never performed any services for the Company. The payments were made directly to Mrs. Frankel individually and not to her husband's estate.

Conversely, there are no findings that deceased had a controlling interest in the Company (he didn't; he only owned 5.9% of the stock at the time of his death), or that he

was related in any way to the other stockholders or shareholders (he wasn't), or that he or his widow had any control directly or indirectly by family relationship, voting trust or otherwise over any other stockholder or director (they didn't).

As stated in the government's brief the District Court made specific findings that the payments made to the widow were *not* in consideration of or as additional compensation for Mr. Frankel's services; they were *not* paid pursuant to any plan or obligation; they were without any consideration and "* * * *were* benevolent acts and were intended to be and *were* made as expressions of sympathy, generosity and kindness to the widow * * *." (Italics supplied.) (Findings X and XI, Government's brief, pp. 4-5).[1]

REASONS FOR NOT GRANTING THE WRIT

The government argues as a reason for granting the writ that from its analysis of cases decided by the Tax Court that that tribunal had a "change of heart" (p. 7) after *Commissioner v. Duberstein*, 363 U. S. 278 and decided cases in favor of the government which, the government apparently concedes, should have been or would have been decided in favor of the taxpayers in the absence of such a change. This is not a Tax Court case and we submit if a writ were to be issued in any such case it should be only in an appeal from a Tax Court decision. There is no contention that any District Court has suffered any such inconsistencies which, it is claimed, beset the Tax Court. In fact, the government admits that in the usual sense no conflict exists (p. 7). However, it is argued that this results in an "unseemliness" (p. 7) which we respectfully submit is not a ground for certiorari under Rule 19 of this Court.

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[1] Unless otherwise noted, page numbers hereafter refer to government's brief.

The kernel of the government's argument is that it has a backlog of other cases involving the question of payment to widows and that it wants some help to solve an administrative problem that is "virtually insoluble." We submit (1) that the function of this Court is not to solve administrative problems; (2) that the problem is not insoluble; (3) that if a problem exists it is caused by the Commissioner's own stubborn reluctance to follow the rules laid down by the courts in previous cases over the years. This last point is illustrated by the history of widow payment cases.

WIDOW PAYMENT CASES

The natural and normal human reaction of businessmen to materially express their sympathy for the bereaved widow of a respected fellow associate or employe has for years run headlong into the adamancy of the Commissioner and has produced a flood of expensive litigation.

The Internal Revenue Code of 1939, Section 22(b)(2) provided that death benefits paid pursuant to a contractual obligation qualified for a $5,000.00 exclusion from gross income. The companion section in Internal Revenue Code of 1954 is Section 101(b) but it was amended to remove the requirement that the payment must be made pursuant to a contractual obligation.

Under the 1939 Code there was considerable litigation under fact situations similar or analogous to the case at bar. The Commissioner consistently took the position that the payments to widows were not gifts but were contractual obligations subject only to the $5,000.00 exclusion. The courts consistently held that where the payment was voluntarily made directly to the widow who performed no services for the corporation which received no benefit and the husband had been fully compensated the payments were

gifts even though the basic reason for the payments was the deceased's past association with the employer. (The case at bar comes squarely within these criteria.) See *Hahn v. Commissioner*, 13 CCH T.C.M. 308; *Macfarlane v. Commissioner*, 19 T.C. 9; *Hellstrom Estate v. Commissioner*, 24 T.C. 916. After being "severely battered in litigation" (*Bounds v. United States*, 262 F. 2d 876, 4 Cir.), the Commissioner finally gave up and on August 25, 1958 announced that in view of the adverse court decisions he would no longer litigate such cases arising under the 1939 Code. Rev. Rul. 58-613, 1958-2 C.B. 914. Then, rather coyly, he said the Internal Revenue Service's position in cases arising under the 1954 Code would be made at a later date.

Then came two cases which arose under the 1939 Code but were decided after the 1954 Code had become law. *Rodner et al. v. United States*, 149 F. Supp. 233 and *Bounds v. United States*, 262 F. 2d 876. Both were decided in favor of taxpayers following all the prior decisions but, peculiarly enough, both cases contain dicta to the effect that if they had arisen under the 1954 Code the result might be different because the law had been "changed" and "amended". We submit these dicta resulted from some argument by government lawyers and what this judicial carelessness has cost the taxpayers in litigation expense since is anybody's guess.

In any event, the government pounced on these dicta and started litigating cases under the 1954 Code arguing that the law had been changed and promptly lost all of them, including the case at bar, on that issue. *Reed et al. v. United States*, 177 F. Supp. 205, affirmed 277 F. 2d 456; *Cowan v. United States*, 191 F. Supp. 703; and *Wilner v. United States*, 195 F. Supp. 786.

Then came *Duberstein* and, like Don Quixote, the government rode off in another direction. In that case, before this Court, the government argued that "gifts should be defined as transfers of property made for personal as distinguished from business reasons" contending, much as here, that such would solve an administrative problem. This Court expressly rejected that "invitation" and held that previous case law on gifts was not changed, that each case was a fact question for the trier of that issue which must be affirmed if not "clearly erroneous" (363 U. S. 291).

Then, the government got another new notion and argued in *United States v. Kasynski*, 284 F. 2d 143 that a corporation cannot and may not have the personalized feelings required by the principles recognized in *Duberstein*. The Tenth Circuit disposed of this by stating, "This is but a reargument of the question that a gift must be made for 'personal rather than business reasons' ", which, as stated, had already been rejected by this Court.

Imagine our surprise, then, when the government's appeal to the Eighth Circuit completely abandoned the contention that the 1954 Code made any change in the applicable law and did not even argue that the trial court's findings were clearly erroneous. Instead, the government contended the case should be remanded for more "meaningful findings" which the Court of Appeals, Sanborn J., disposed of as follows:

> "We believe that to remand this case for more 'meaningful' findings as to motivation and intent would serve no useful purpose and would merely prolong this controversy. See and compare, United States v. Kasynski, 10 Cir., 284 F. 2d 143-146 in which the same question as to adequacy of the trial court's findings was raised" (p. 18).

"To our minds, the findings and conclusions of the trial court are adequate. We think the factual basis for them, although stipulated, was not inadequate and was sufficient to sustain the judgment" (p. 19).

"We are satisfied that . . . the present case, the trial judge, whose long 'experience with the mainsprings of human conduct' we regard as unsurpassed, did not misconceive or misapply the applicable law in this case to the facts before him" (p. 20).

SUMMARY

In summary, we contend that the writ should not issue because there is no conflict between the decision in the case at bar and decisions of the Courts of Appeal of other Circuits. That simply to solve an administrative problem is not the function of this Court; that if such a problem exists it is due solely to the administrative reluctance over a number of years to apply to the facts the judicial principles announced by the courts.

We suggest that few, if any, similar cases arising under the 1954 Code have been disposed of while the government has been experimenting with its various theories in the courts—and hence the backlog. If it is the policy of the Internal Revenue Service to make a widow's claim for refund so expensive to litigate that she will have to give up, that was very nearly accomplished in this case. Sam Frankel has been dead nearly seven years. To his widow, who supports herself by her own earnings, the some $3,000.00 involved here is proportionately more important than the financial interest of the government. As stated by the Court

of Appeals, this case should come to an end and for these reasons we submit the petition be denied.

Respectfully submitted,

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